

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS CHRISTOPHER NEAL,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 208217

Kent Circuit Court

LC No. 97-005186 FH

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). He was sentenced as a second habitual offender to concurrent terms of fifteen to thirty years' and ten to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

This case arose from an incident on September 2, 1996, when the victim awoke to find an intruder in her apartment. The intruder climbed on top of her, assaulted her, and threatened to kill her. The victim's brother heard her screams, entered the room, and hit the intruder with his fist, after which the intruder fled from the residence. Originally, this case was scheduled for a jury trial; however, after the trial court ruled on plaintiff's motion to allow testimony from victims who had experienced similar home invasion sexual assaults, defendant waived his right to trial by jury.

Defendant argues on appeal that the prosecutor did not present sufficient evidence to support his conviction. Specifically, defendant contends that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that defendant had the specific intent to sexually penetrate the complainant, which is an element necessary for defendant's conviction under both crimes charged. When reviewing a challenge to the sufficiency of the evidence in a bench trial, we must view the evidence in the light most favorable to the prosecution. *People v Wardlaw*, 190 Mich App 318, 319; 475 NW2d 387 (1991). The standard of review for a bench trial is whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 269-270; 380 NW2d 11 (1985). A trier of fact may make reasonable inferences from the facts, if

the inferences are supported by direct or circumstantial evidence. *People v Metzler*, 193 Mich App 541, 547; 484 NW2d 695 (1992). The evidence is sufficient if, taken as a whole, it justifies submitting the case to the trier of fact. *People v Hampton*, 407 Mich 354, 367; 285 NW2d 284 (1979). Circumstantial evidence and reasonable inferences arising from such may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Intent may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Bower*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

In *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982), this Court set forth and explained the specific elements of assault with intent to commit criminal sexual conduct:

Specifically, the elements of assault with intent to commit CSC are as follows:

(1) There must be an assault. (2) There must be a sexual purpose. When the act involves penetration, defendant must have intended an act involving some sexually improper intent or purpose. When the act involves contact, defendant must have intended to do the act for the purpose of sexual arousal or sexual gratification. (3) When the act involves penetration, the intended sexual act must have been one involving some actual entry of another person's genital or anal openings or some oral sexual act. When the act involves contact, defendant must have specifically intended to touch the complainant's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, or defendant must have specifically intended to have the complainant touch such area on him. (4) There must be some aggravating circumstances, e.g., the use of force or coercion. An actual touching is not required. When the act involves penetration, it is not necessary to show that the sexual act was started or completed.

Here, defendant contends that nothing of a sexual nature was either said or done. Plaintiff, however, presented evidence that the victim, when sleeping on her couch, awoke that night to find a man on top of her, poking her in the side with a sharp object, covering her face and threatening her. The victim believed that the intruder was going to rape her. Further, the victim's brother testified that when he heard screams from his sister, he went to the stairs where he heard language to the effect of "oh, God, please, no." He testified that he saw a man standing over his sister with some kind of knife in one hand, holding her leg up in the air, and telling her to be quiet or he would kill her. Viewing this evidence in a light most favorable to the prosecution, we find that the evidence was sufficient for a rational trier of fact to determine that there was intent to commit criminal sexual penetration.

Defendant next argues that the trial court violated MRE 404(b) when it allowed three women to testify about prior assaults that may or may not have been committed by defendant, and that the coercive effect of this ruling deprived defendant of his constitutional right to trial by jury. We review the trial court's evidentiary rulings for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). We review for clear error the trial court's determination that defendant validly waived his right to a jury trial. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

In general, character evidence is not admissible to prove conduct. MRE 404(a). MRE 404(b)(1) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith”; however, it may be admissible for other purposes, such as proof of intent or identity. In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994), our Supreme Court clarified the standard for admission of prior bad acts evidence:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

Other acts evidence is not admissible if the only theory of relevance is that it shows the defendant’s inclination to wrongdoing in general to prove that the defendant committed the conduct in question. *Id.*, 63. In *VanderVliet*, *supra* at 65, the Court summarized:

There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. (Footnote omitted.)

According to our Supreme Court in *Vandervliet*, “Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory.” *Id.* (emphasis in original). Further, the trial court’s decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Defendant argues that two of the three witnesses who testified with regard to prior bad acts of defendant did not identify the man who attacked them, and thus their testimony does not comply with *VanderVliet*, *supra* at 74, because the witnesses’ identification of the man that attacked them as a short, stocky, black male is insufficient to establish that it was the same person as defendant. Here, however, the intruder was interrupted before a sexual penetration actually took place, and the victim was unable to identify her attacker. Further, defendant agreed that identity and intent were at issue. Although plaintiff proposed fourteen witnesses to testify about ten previous incidents, the trial court allowed the testimony of only three of these witnesses. One of the witnesses identified defendant as her attacker. Each of the other two witnesses testified that her attacker was a short, stocky, black male. In addition, after complainant’s incident and that of the two witnesses, a police dog tracked the intruder’s scent to the building where defendant lived at the time of two of the incidents, but from which defendant had been evicted from days before one of the incidents. We conclude that the trial court did not abuse its discretion when it allowed the three women to testify based on the indicia of identity and intent.

Defendant also argues that the intruder’s actions in the witnesses’ accounts were dissimilar and should not have been admitted. In *VanderVliet*, our Supreme Court noted that a showing of distinctive

similarity between other acts and the charge at issue is not required in every instance where Rule 404(b) evidence is proffered. *Id.* at 69. “Where the proponents’ theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, similarity between charged and uncharged conduct is not required.” *Id.* (footnote omitted). Here, the similarity of the misconduct was not relied upon; instead, plaintiff relied upon the similarity of the witnesses’ description of the intruder. The evidence was offered to show identity and intent, not to demonstrate *modus operandi* or “signature” of the defendant.

Finally, defendant argues that assuming that the testimony of one or more of these women was relevant to demonstrate identity and intent, the trial court erred by failing to weigh its probative value against the unfair prejudice. Defendant claims there was limited probative value in the alleged generic crimes where two of the witnesses failed to identify defendant as their attacker, but significant prejudice was caused by this testimony. Here, the victim was unable to identify her assailant and the incident was interrupted before any sexual penetration occurred, which are two important elements of plaintiff’s case. The trial court, however, addressed MRE 403 when it determined that an issue did exist regarding the cumulative effect of the testimony of all the witnesses offered by plaintiff, and it limited the amount of testimony accordingly. The trial court implicitly determined that the evidence, as limited by the court, balanced in favor of admission. We conclude that the court did not err when it allowed admission of the testimony of the three witnesses regarding the identity and intent of defendant where identity and intent were at issue and where the court looked at the evidence proffered and limited it to testimony of three persons, about three separate incidents, with some clear similarities, rather than the testimony of fourteen persons about ten separate incidents.

Because we find that the trial court’s ruling allowing MRE 404(b) evidence was not erroneous, we need not further address defendant’s argument.

Defendant has raised additional issues in a *pro per* supplemental brief. We have reviewed the issues raised and find them to be without merit.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot